Argument 6 1/2 66

Supreme Court of the United States.

December Term, 1867.

THOMAS W. PEIRCE, APPELLANT,
vs.
THE UNITED STATES. } No. 131.

ON APPEAL FROM THE COURT OF CLAIMS.

And now comes the said Peirce, and says that—

On the 14th of February, 1866, the Court of Claims rendered their judgment in said cause, adverse to the petitioner, and dismissing his petition.

On the 20th of April, 1866, the petitioner, by his counsel, Mr. Cushing, prayed an appeal, filing exceptions to the said judgment of the Court of Claims.

On the 21st of June, 1866, the Court of Claims ordered that the appeal in the case be allowed and certified, with alterations of, and additions to, the points decided, and alleged for error in the claimant's said petition for appeal.

Afterwards, on the same 21st day of June, 1866, the plaintiff, by his counsel, Mr. Goodrich, appeared and moved that the record to be certified on the appeal should embrace all the evidence offered by either party on the trial before the Court of Claims, which motion the Court allowed by special order, and such evidence has accordingly come up in the appeal transcript, as by the printed copy herewith submitted to this Court appears.

And the said Peirce further says, that he is advised by counsel, that, according to the rules and practice of this Court, the evidence aforesaid ought not to have been embraced in the appeal record.

Wherefore he respectfully prays the Court that he be permitted to strike out such evidence from the said record, or to have the case sent back to the Court of Claims for correction in this respect, and thereupon remitted to this Court without loss of its place on the calendar thereof.

C. CUSHING,
Of Counsel for Appellant.

Abstract

Brief of Autographs

Collier

SUPREME COURT OF [illegible] ILLINOIS.

[illegible] IN ERROR.

[illegible] IN ERROR.

IN ERROR TO THE [illegible] OF ILLINOIS.

ABSTRACT OF CASE.

This is a writ of error to a State Supreme Court. The only question arising upon the record, of which this Court has jurisdiction, is the validity of certain patents for the land in question, issued by the United States. It is, therefore, unnecessary to abstract the record further than to bring to the notice of the Court the single question in controversy.

The patents are in the usual form, the first being for the south-east quarter of section four, town. one south, range ten west, in the district of lands subject to sale at
See print'd record, p. 9 Kaskaskia, Illinois, to John Sampson, &c., &c.

The second to same, for the west half of the north-west quarter of section three, town. one south, range ten west,
Print'd record, 9 & 10 in the same land district.

The third to Thomas Sampson, for the north-east quarter of south-east quarter of section four, town. one south,
Page 12 range ten west, in the same district.

Page 6 The fourth (in point of time) to George Schellenberger, for the north half of the north-east quarter and south-west quarter of the north-east quarter, and the south-west quarter of north-east quarter of section four, town. one south, range ten west, in the same district.

From those patentees title was shown by mean conveyances into the plaintiff, Sebastian Reichert.

The defendants below, to defeat the said title from the
Page 16 United States, introduced, first, a certified copy of a survey made by Dan'l McCann. This survey was identified as covering the same land purported to be conveyed by deed of confirmation, to one Nicholas Jarrott; second, a copy of the said deed of confirmation, signed by Arthur
See page 22 St. Clair. The land sued for was proven to be included in the said survey and deed of confirmation.

The introduction of this survey and deed of confirmation was objected to by plaintiff's counsel in the Circuit Court, but said objection was overruled, and they were admitted. Judgment in the Circuit Court was rendered
Page 27. against the plaintiff below.

The case was taken, by appeal, to the Supreme Court of Illinois; and, amongst other errors, it was assigned that
" 29. the Court admitted improper evidence on the part of defendants, and overruled motion for a new trial

" 29. The Supreme Court affirmed the decision of the Circuit Court at its January term, 1864. Opinion of Court in 33 Ill. Reports, P. 433.

Upon motion the said Supreme Court ordered, that it
29 & 30 be certified in this case that there was drawn in question the validity of an authority exercised under the United States in issuing certain patents signed by the President of the United States, and otherwise duly authenticated, for the lands claimed by said appellant, and that the said patents were held unavailing, and were decided invalid as against a claim for the same lands under a deed of confirmation or patent issued by Arthur St Clair, Governor of the Territory of the United States north-west of the Ohio river, and there were drawn in question certain acts, reports, and instructions of the Secretary of the Treasury of the United States and Commissioners of the General Land Office, and of certain Commissioners appointed by and acting under the authority of certain laws of the U. S., and more particularly under a law passed February 20, 1812, entitled an act for the revision of former confirmations, and for confirming certain claims to land in the District of Kaskaskia, all which acts, reports, and instructions exercised under the authority of the United States, declared invalid the said deed of confirmation or patent of said Territorial Government, and declared said lands subject to public sale; all of which reports and instructions were made part of the record in this case, and that the decision of the Court was against the validity of said authority of the United States.

27 A stipulation of the parties makes such portions of the evidence as are contained in printed books, American State papers, Statutes at large, and all printed instructions and documents from the Department in Washington, relating to or affecting title to the lands in question, part of record, without they being copied therein.

From this decision of the Supreme Court of Illinois, the plaintiff, Sebastian Reichert, sued out a writ of Error to
30. the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT.

It seems proper to dispose in the first place of some of the evident fallacies started by the counsel for the defendants below and appellees, in the Supreme Court of Illinois, and adopted by the Supreme Court in its last decision. One of them is that the title to the land in question never was in the United States. "It was not granted by the United States, because the title was not in them. One of the objects of the acts of Congress and instructions to the Governor, was to ascertain the public lands, to find out what portion of the domain ceded by Virginia, *passed by the cession*; and that was easily ascertained by first establishing the claims of the settlers, the residuum only belonged to the Government, subject to be held or otherwise disposed of by them." So says Judge Breese, P. 439. XXXIII Vol. Ill. Rep

Now the deed of cession of 1st of March, 1784, conveys unto the United States all right, title, and claim, as well of soil as jurisdiction which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia Charter, situate, lying, and being to the north-west of the River Ohio, to and for the uses and purposes, and on the conditions of the said recited act. The condition which comes here in question (Act of Virginia, Dec. 20, 1783. Revis. Code of Virg, 1819.) is as follows: "That French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their *possessions and titles* confirmed to them and be protected in the enjoyment of their rights and liberties." It seems that this was one of the conditions proposed by the U. S. by their act of 13th September, 1783, and accepted by Virginia.

All that can be said in regard to this stipulation is, that as the possesions of the settlers enumerated had not been confirmed by Virginia, the U. S. undertook to do so, but there was no reservation of any particular tracts of land, of which the fee did not vest in the United States. If the U. S. had never complied with the stipulation, such failure would surely not have revested Virginia with the Territory so ceded; nor could any settler on a particular tract of land have shown title from Virginia, that State never having granted or confirmed him anything. If he could have shown a valid grant from the French or English Government, he might have set up such grant against any subsequent one from the United States. Without such a grant the Dominion and fee in the N.W. Territory was prima facie in the United States by the treaty of peace with England, the cessions from Massachusetts, Connecticut, New York, and Virginia, whose titles, or rather, claims, were, perhaps, equally good or bad.

In the case decided in Breese's Reports, Doe vs. Hill (Breese old edition, P. 236) it was therefore said by the Judge delivering the opinion: "It was conceded on the argument that the United States were the original proprietors, and the source from whence the title of both parties was derived to the premises."

Another very strange position taken by counsel for defendants in Supreme Court of Illinois, and also assumed by the Court, is, that the decision made in 1829, in the Supreme Court of Illinois, must be

sustained, because Congress, by an act passed August 15, 1849, restored to the *purchasers* from the United States the money they had paid for *this land.*

The claimant for the land in the case before the Court in 1829 was one Samuel Hill. Not being willing to pursue his case any further, he succeeded to get a private law passed for his benefit. He had bought a half section according to the surveys of the United States, and had obtained a patent therefor, the said land having been exposed for sale by the United States as public land. In the present case the plaintiff claims about 280 acres sectional lands, sold to him as public lands of the United States, patented in 1838, 1839 and 1853, other and different lands altogether than those claimed by Hill, but partly embraced in the claim of Philip Engle, under which the land bought by Hill from the United States was claimed adversely, and which claim was for about 800 acres.

Now before the commencement of the present action by Reichart, he has again and again applied to the Executive Department for the refunding of his money, but has been refused by two subsequent Land Commissioners, both informing him that the United States held the paramount title, and that there was no evidence of any confirmation. See also laws relating to Public Lands, Page 410, 411, 594, 653. This last action of the Government might be pleaded in favor of the United States patent, with the same propriety that the passage of a private law for the relief of Hill is set up in favor of this confirmation.

As to the main question in the case the validity of the Governor's confirmation, the counsel for defendants, and the Supreme Court of Illinois (Breese Reports) have based it entirely on the report agreed to by the Congress under the old articles of confederation made in June 20, 1788, and the instructions given under said resolutions.

Now without stopping to inquire whether this report made on the proposition of one Morgan, for the purchase of a large tract of land in the Illinois country, which purchase was never effected, ever had any force, or if it had, it was not repealed by the law of March 3, 1791, passed by the Congress of the United States under the present Constitution, it is very clear that said resolution of the old Congress gave the Governor of the N. W. Territory not the slightest pretext to make the confirmation in question.

The report of the Committee of June 20, 1788. 1. U. S. Stat. (Edition of 1815) Page 580, recommends that measures be immediately taken to confirm in their possession and titles the French and Canadian inhabitants and other settlers on those lands (mentioned in the Report as to be reserved), said French Canadian and other settlers being located in the villages of *Kaskaskias, Prairie du Rocher*, and at *Kahokia Village*, also at *Fort Chartres and St. Philips*, so as to satisfy all just claims *of the ancient settlers* on that river, (Mississippi) and that they should be confirmed in the posession *of such lands as they may have had at the beginning of the late Revolution*, which may have been allotted to them according to the *laws or usages of the Governments under which they have respectively settled*.

It also recommends that certain tracts adjoining respectively the villages of Kaskaskias, Prairie du Rocher and Cakokia, as also the

forts St. Philips and Chartres, should be laid out in parallelograms of such extent as shall contain four hundred acres *for each of the families now living at the aforementioned places.* These four hundred acre tracts were to be donations from the United States; they were to be divided by lots, and immediate possession was to be given. No person, however, could alienate the same, until he or his heirs had resided thereon for three years from the time of such distribution, within the District, at the end of which period every such resident *shall obtain a title* to said reserved lot; and all lots not thus conveyed to residents shall revert to the United States. The report recommends further that the Governor of the Western Territory be instructed to repair to the French settlements on the Mississippi, at and about the Kaskaskias; that he *examine* the titles and possessions of the *settlers* as above described, in order to determine *what quantity of land* they may severally claim; and that he take an account of the several heads of families living within the reserved limits, in order that he may determine the quantity of land that is to be laid off, &c.

On August 28, 1788, this report having been recommitted was modified as to the shape of the land, which was to be reserved for the location of claims. In consequence of such resolves instructions were issued to the Governor of the N. W. Territory to give despatch to the several measures. These instructions proceed in this wise: when you have examined the titles and possessions of the settlers on the Mississippi, in which they are to be confirmed, and given directions for laying out the several squares, which the settlers may desire, as they shall think best among themselves by lot, you are to report the whole of your proceedings to Congress.

Now there is most clearly no authority given to the Governor of the N. W. Territory to make himself any confirmations or grants *of these ancient possessions and titles.* No ingenuity can torture such a power out of the resolves and the instructions. He was to examine and to report. The power to make a deed for another cannot be implied, but must be expressly given.

The Supreme Court of Illinois in the decision in Breese, re-affirmed by the Supreme Court in 33d Illinois, espressly decides that the claim in question was an ancient claim of a preexisting right (derived from the former governments) and not a donation claim, or any other claim. Breese old edition 245. That the Governor of the N. W. Territory by his confirmation only released the claims of the United States, the title and possessions having previously vested in the claimant.

Now this is a singular mistake. The land in question does not lie within those ancient French settlements. It is at least five miles south of Cahokia village, and from 25 to 35 miles north of Prairie du Rocher and Kaskaskia. Very few French grants will be found outside of the villages, the common fields thereto belonging, and the commons appertenant thereto, (large tracts of timber and pasture lands). The United States Commissioners who reported upon it and declined to confirm it, reported upon it as a settlement claim or improvement claim. See American State paper, Public Lands Vol. 2, Page 222, arising under the fourth section of law of 1791. It is impossible that the

Supreme Court in 1829 could have had the survey of Daniel McCann before it. Because that survey distinctly alleges that the claim was not a claim of an *ancient* Government, existing as the law requires it, at the time of the Revolution.

This survey made the 10th day of April, 1798, was however before the Court in its recent decision, 33 Illinois, and was introduced in evidence by defendants. The surveyor sets forth that in pursuance of a warrant from the Governor, he made the survey of the land in question for Nicholas Jarrott, which he claims by virtue of Philip Engles and Joseph Lambert's concessions from the Court of Cahokia, bearing *date the 1st of October*, 1785, *and 5th day of January*, 1793.

Now surely such concessions are not from the ancient Governments, existing before the Revolution—they are not even *supposed grants* by said ancient Governments, which when settled and improved might be granted under the said 4th section. No resolve of Congress, no law can be found by which the Court of Cahokia could make any such concession. Whatever power may have been given to the Governor by the law of March 3, 1791, it certainly gave him no power to make a confirmation of such a concession made long after the Revolution, after the treaty of Peace with Great Britain, and even after the Virginia cession. And yet the Governor's patent dated February 12, 1799, claims to have been made under the acts of the Continental Congress of June 20, and Aug. 1788.

Whatever confirmations, however, those Governors made, authorised or unauthorised, were never considered final either by the Executive Department or by the Legislature. We have stated before that no where is express power given to Governors to issue certificates, patents, deeds, or confirmations. He is to report his proceedings to Congress. As far as ancient grants were concerned he was to examine into their correctness As far as donations were concerned, he was to report the number of families, or rather of their heads, and reserve lands for future donations. He was under the law of 1791, where grants could not be proven, but where actual settlements had been made under supposed grants, and where cultivation had taken place, to confirm such ancient grants.

It may be well here to distinguish once for all among the different claims of settlers on the Mississippi in the Illinois country. First their were grants prior to the Revolution, claimed to have been made from the French Government prior to the treaty of Paris of 1763, and from the English Government since that treaty. I believe no English grants were ever made, or at least recognised by the Home Government. France had made grants either directly through her Canadian or Louisiana Governors, or indirectly through Priests and Missionary societies. The French villages, their common fields and commons, rest upon these French grants. There were some few large tracts granted by the French Government to private individuals.

By resolve of Congress, June 20, 1788, a second class of claims was provided for by ordering reservations of land adjoining said villages to be made for future donations to families. These donation claims were established by the law of March 3, 1791, which virtually

repealed the resolve of 1788. So far we have two classes. 1st—*Ancient* grants existing before the Revolution, mostly, it is believed, all French. 2d—Donations, which were called popularly, head rights. The law of 1791 still created another class, viz: 3d—Claims allowed to persons who had claimed under an ancient grant, but were unable to prove the authority of the grantor and who had actually resided on and cultivated the land, (of course prior to the passage of this law.) These claims were popularly called settlement and improvement rights, and it was in this class that an attempt was made to commit the most unmitigated frauds on the Government, as shown by the reports of the Commissioners. There was also a fourth class subsequently created, to-wit: A donation or bounty for each militia man who had rendered service in the Indian war of 1793 and 1794, of 100 acres each, which claims are familiarly known as *militia rights*.

The claim in question is pretented to have been confirmed February 12, 1799.

As early as the 26th of March, 1804, an act was passed making provisions for the disposal of the public lands in the Indiana Territory and other purposes, by which Congress most clearly indicated that those claims were not considered as having been finally adjudicated upon, and which appointed a board, &c., &c. See Vol. III. old statutes, P. 596 following.

See also law March 3, 1807, old edition, Vol. 4, Page 120.

An act confirming claims to land in the District of Vincennes, and other purposes (S. 1 2 6) of laws of May 1, 1810. An act confirming decisions P. 307., V. 4. See law of Feb. 20, 1812., Vol. 4, old ed. P. 376 Act for revision of former confirmations

There was never any the slightest doubt that claims not confirmed by act of Congress were not valid claims until the decision in Breese. The repeated acts of confirmation by Congress would have been wholly superfluous if the Governor had had a legal right given him by prior acts of Congress to make valid confirmations.

GUSTAVUS KOERNER,

For Plaintiff in Error.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1867.

SEBASTIAN REICHERT

VS.

MICHAEL FELPS

AND OTHERS.

BRIEF OF LYMAN TRUMBULL,

Attorney for Surviving Defendants.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1867.

IN THE

Supreme Court of the United States.

SEBASTIAN REICHERT,
vs.
MICHAEL FELPS, & others.

Supreme Court of the U. S.
December Term, 1867.

This was an action of ejectment by Sebastian Reichert against Michael Felps, Ruth Felps, William L. Felps, Henry T. Felps, David Felps, and Jacob Felps, to recover certain lands in St. Clair county, Illinois. Judgment was entered in the Supreme Court of Illinois in favor of the defendants, against whom a writ of error has been presented to this Court. Michael, David, and Jacob Felps only appear, the other defendants having deceased, as appears by the return to the writ of error, (Record 32.)

Whatever judgment, if any, this court may enter on the merits of the case, it is submitted that it can have no effect on the rights of the heirs of deceased defendants, not brought before it.

The plaintiff's title is unquestioned, in case the land in controversy was subject to entry, in 1838 and 1853, the dates of the respective patents under which he claims—but if the land had been previously granted, reserved from sale or appropriated, those patents are void. (Stoddard *vs.* Chambers, 2 Howard, 317.)

Defendants derive title to the land as an ancient "claim," known as number "1,800," originating in the possession of "the French and Canadian inhabitants and other ancient

settlers of the Kaskaskies" prior to the year 1783, and which the Government, by repeated acts, has sanctioned and protected.

1. By act of Virginia, December 20, 1783, (11th Henning's Statutes at Large, 326 and 327,) authorizing the conveyance of its lands north-west of the Ohio river to the United States, on the condition, among others, "That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincent's, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties."

2. By deed of cession of Virginia to the United States, March 1, 1784, reciting the foregoing act and condition, and conveying only the lands not reserved, and the acceptance of said deed by the United States. (Public Lands Laws and Instructions, pt. 1, 585.)

3. By resolve of Congress of Confederation, June 20, 1788, agreeing to the report of the committee, making provisions respecting claims and donations to land in the Illinois country, which report, among other things, declares: "That from any general sale which may be made of the lands on the Mississippi, there should at least be a reserve of so much land as may satisfy all the just claims of the ancient settlers on that river, *and that they should be confirmed* in the possession of such lands as they may have had at the beginning of the late revolution, which may have been alloted to them according to the laws or usages of the Governments under which they may have respectively settled. * * * That measure be immediately taken for confirming in their possessions and titles the French and Canadian inhabitants and other settlers on those lands, who, on or before the year 1783, had professed themselves citizens of the United States, or any of them, and for laying off the several tracts which they rightfully claim within the described limits; * * * that whenever the French and Canadian inhabitants and other settlers aforesaid shall have been confirmed in their possessions and titles, and the amount of the same ascer-

tained, &c., &c., the whole remainder of the soil within the reserved limits above described, shall be considered as appertaining to the general purchase. * * * That the Governor of the Western Territory be instructed to repair to the French settlements on the Mississippi at and above the Kaskaskies; that he examine the titles and possessions of the settlers as above described, in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense." (Public Lands, Laws, &c., pt. 1, 29.)

4. By the survey of Daniel McCann, Surveyor, made April 10, 1798, as follows: "In pursuance of a warrant from his Excellency, Arthur St. Clair, Governor of the territory northwest of the Ohio, surveyed on the tenth day of April, one thousand seven hundred and ninety-eight, the above tract of land (referring to accompanying plat) containing twenty-four anprents in front by thirty-eight in depth, equal to seven hundred and seventy-eight acres and one hundred and twenty-one perches, for Nicholas Jarrot, which he claims by virtue of Philip Engle and Joseph Lambert's concessions from the Court of Cahokia, bearing date the first day of October, eighty-five, and the fifth day of February, one thousand seven hundred and ninety-three, situate in Cahokia township, St. Clair county, joining lands of Joseph Ogle on the south-east, and lands of George Lunceford on the northwest, and by land of William St. Clair on south-west." (Record 16.)

5. By the patent issued by Governor St. Clair, February 12, 1799, duly recorded October 19, 1804. (Record 22.)

6. By the following entry on the records of the Land Office, to wit: "List of claims to land within the District of Kaskaskia, entered with the Register of the Land Office prior to the 1st day of November, 1806, which have been confirmed by the Governor of the Northwestern or Indian Territory, or acted on by the Board of Commissioners for said district."

"1,800, George Lunceford—778 acres, 131 perches of

land—as assignee of Nicholas Jarrot, who was assignee of Philip Engle, who claimed in his own right and as assignee of Joseph Lambert, situated in the county of St. Clair, and bounded as follows: beginning at a stone, &c. * * * *This claim has been patented by the Governor to Nicholas Jarrot.*" (Record 18.)

7. By the resurvey of Wm. Rector, Deputy Surveyor, made May 28, 1809, and entered among Illinois private surveys in the Surveyor General's Office. (Record 26.)

This survey was made under authority of the proviso to the first section of "an act making provision for the disposal of the public lands in the Indian Territory, and for other purposes," approved March 6, 1804, which is as follows: "That such tracts of land as are lawfully claimed by individuals within the said boundaries, and the title whereto has been, or shall be recognized by the United States, shall be layed out and surveyed at the expense of the parties respectively;" and the fifth section of the act of November 3, 1805, supplementary to the foregoing, which declares: "That persons claiming lands in either of the said three districts, either under legal grants derived from the French or British governments, or by virtue of actual possession and improvement, or for any other account whatever, may, until the first day of November next, give notice in writing to the Register of the Land Office, of their claims and have the evidence of the same recorded." (Pt. 1st, Pub. Land Laws, 104, 129.)

The Treasury Department, in its instructions of July 9, 1804, under these acts, say: "Where grants have been made by the Governor, it is absolutely necessary that the grant itself should be filed and recorded; *but in those cases it is unnecessary to file or record any other evidence of claim but the grant, for the Governor's grant, as I have before mentioned, is in itself the evidence of title, and supesredes the necessity of recording the previous deeds.*" (Public Lands, Laws, and Instructions, Pt. 2, 664.

St. Clair's grant was recorded Oct. 19, 1804. (Record 22.)

The validity of the confirmation or grant of Governor St.

Clair was brought before the Supreme Court of Illinois in 1829, in an action of ejectment by one Hill, who had entered and obtained a patent for a portion of the premises as public land. The Court held the Governor's confirmation valid. (Doc. ex Dem. Moore and others *vs.* Hill, Breese, 236.)

After this decision of the Supreme Court of Illinois, the United States, recognizing it as establishing the validity of the grant by Governor St. Clair, passed an act August 11, 1842, refunding the money paid by the patentee who had entered it as public land. (Private Laws, 6. Stat. at Large, 860.)

This history of the Government's dealing with the land in controversy, shows that it was reserved from the beginning from the public lands which were to be sold, and that the Government never intended it should be sold as public land.

The patent issued by Governor St. Clair in 1799 divested the United States of any claim it might have had to the land, and its subsequent sale as public land was therefore void.

It is assumed by the plaintiff that "no authority was given to the Governor of the Northwestern territory to make confirmations or grants of these ancient possessions and titles."

The resolve of June 20, 1788, affords an answer to this assumption, where it instructs the Governor of the Western territory to repair to the French settlements on the Mississippi river, "examine the titles and possessions of the settlers, as above described, *in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense.*"

Who was to determine the quantity of land the claimants were to have, and to lay it off for them at their own expense, except he whose duty it was to examine the titles and possessions for that purpose? When this was done, and the land laid off as the law declared it should be, the United States gave up all claim, if it ever had any, to the land thus set off.

No other evidence of this would have been necessary than the survey which was made and entered upon the Land Office

records, and the fact that the Governor thought proper to evidence the claimant's right by a more solemn instrument, in the shape of a patent, is only confirmatory of what would have been a good title without it. All that was necessary to be done was to separate the private claims from the other lands, so that the latter might be brought into market. The United States never pretended to make claim to the lands set off to private claimants; on the contrary, it has, by numerous acts, as shown in the history of this case, recognized them as valid.

SEC. 4, act of March 3, 1791, authorizes the Governor in express terms to make confirmations. It is as follows:

"That where lands have been actually improved and cultivated at Vincennes, or in the Illinois, under a supposed grant of the same, by any commandant, or Court claiming authority to make such grant, the Governor of said territory be, and he hereby is, empowered to *confirm* to the persons who made such improvements, their heirs or assigns, the lands supposed to have been granted as aforesaid, or such parts thereof as he, in his discretion, may judge reasonable, not exceeding to any one person four hundred acres." (Pt. 1, Land Laws, &c., 42.)

McCann's Survey, Record 16, shows that this claim was of the precise character which the Governor was authorized to confirm by the fourth section of the act of 1791.

Jarrot, as assignee of Engle, had two claims, the one of Engle in his own right, and that of Lambert, which Engle held as assignee, and hence was entitled to twice four hundred acres. The restriction to four hundred acres did not prohibit grants to one individual amounting to more than four hundred acres when he claimed as assignee of several. (Choteau's heirs *vs.* United States. 9 Pet., 147.) The act of March 3, 1791, was not a repeal, but in aid of the resolve of June 20, 1788. The two are to be construed together as one statute, and therefore the express power to confirm given to the Governor by the act of 1791, may justly be extended to lands which were required to be laid off to claimants under the resolution of 1788. In this view the Governor's confirmation is conclusive.

The Governors exercised this power of confirmation for more than twenty years, and their confirmations are styled patents in acts of Congress. (Act of April 21, 1806. Pub. Lands, Laws, &c., part 1, 143.)

A grant, or a concession, made by that officer who is by law authorized to make it, carries with it *prima facia* evidence that it is within his power. No excess of or departure from them is to be presumed. (Delassus *vs.* United States. 9 Pet., 134.)

LYMAN TRUMBULL,
Attorney for Surviving Defendants.